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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

ELWOOD BARCLAY,

Petitioner,

-v-

STATE OF FLORIDA,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

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_____/

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The original opinion of the Supreme Court of Florida is reported as Barclay v. State, 343 So.2d 1266 (Fla. 1977), cert.denied, 439 U.S. 892 (1978). The opinion remanding the case to the trial court for a hearing pursuant to Gardner v. Florida, 430 U.S. 349 (1977), is reported as Barclay v. State, 362 So.2d 657 (Fla. 1978). Following the hearings in the trial court, appeal was taken to the Florida Supreme Court and the decision of that court is not yet reported. See Barclay v. State, _____ So.2d_____(Fla. 1982), Case No. 47,260, decided June 4, 1981, rehearing denied, April 14, 1982. (Petitioner's Appendix, pp. 9-12).

JURISDICTION

Respondent has no quarrel with the jurisdiction of this court pursuant to Title 28, U.S.C., § 1257(3), or any other

provision thereof, at least for the purpose of determining whether to decline assumption thereof.

STATEMENT OF THE CASE

Respondent accepts the Statement of the Case as set forth on pp. 2, 3 of the petition with the exception of the language in the last paragraph on p. 2 indicating that the trial judge found "mitigating circumstances."

STATEMENT OF THE FACTS

By order dated September 7, 1978, the Florida Supreme Court vacated the death sentence previously imposed on petitioner and codefendant Dougan and remanded the cause to the trial court with directions to provide a hearing for the purpose of affording petitioner an opportunity to rebut any of the information contained in the presentence investigation reports. Barclay v. State, 362 So.2d 657 (Fla. 1978).

At the initial hearing in the lower court on June 22, 1979, the only witness called by petitioner was Thomas E. Reeves (Tr. 5). Deputy Reeves was employed by the Office of Sheriff, Jacksonville, Florida, and testified generally as to his background and experience. He investigated the murder of Stephen Orlando and Stephen Roberts. Deputy Reeves explained his part in the investigation of both cases (Tr. 5-15). In response to questioning by petitioner's counsel, Deputy Reeves gave it as his opinion that the murder of Stephen Orlando was cruel, atrocious, and heinous (Tr. 16). In contrasting the testimony of Mr. Hern with that of the tapes as to whether Stephen Orlando begged for mercy, Deputy Reeves stated that he assumed what was on the tapes was correct "because it came from the mouth of the defendant who made the tapes".

(Tr. 18, lines 18, 19). He then gave his opinion as to the purpose of the tapes and in response to further interrogation stated:

> A In my opinion, they did everything that they said they did on the tapes. They could have stretched the truth some or they could have left something out, they could have added something. I don't know. I'm only assuming that what they said on the tapes is what they did.

(Tr. 20).

In responding to the question as to whether petitioner exerted as much influence over the group as codefendant Dougan, the witness replied that if he had to say that there was a second in command, he would say that it was petitioner (Tr. 24).

As to the extent of petitioner's participation in the murder of Stephen Orlando, note the following quoted from Deputy Reeves' testimony on cross-examination:

> Q From the evidence at the trial, Officer Reeves, didn't this convicted man over here, Barclay, ride around all afternoon with Dougan in the car looking for a victim to murder?
>
> A. That's correct.
>
> Q. Did Barclay, at the scene of the crime, aid in holding the defendant Orlando down on the ground?
>
> A Yes, he did, sir.
>
> Q Did he stab him with a knife prior to his being shot by Dougan?
>
> A Yes, he did, sir.
>
> Q Was there any evidence that Dougan told him to stab him, that you know of?
>
> A No, there is not. There is evidence --
>
> Q Huh?
>
> A There is evidence that Barclay took the knife from Evans because Evans was having difficulty getting the knife to penetrate Orlando's chest, and there was a little --
>
> Q Barclay took over?

A Barclay took the knife from Evans.

Q Took over; didn't he?

A And told him if he couldn't do it, he could.

* * * * *

Q Was Barclay's voice on that tape?

A Yes, it was.

Q Did he brag about the killing?

A Yes, sir.

Q And then he ran; didn't he?

A Yes, sir.

Q You had occasion in solving this case to observe this convicted murdered, Barclay?

A Yes, I did, sir.

Q. Now, the word dominate means a lot of things to a lot of different people, Officer Reeves. Do you feel that from your investigation of this case that Barclay carried out these acts of his own free will?

A Yes, I do.

Q Do you thing he was intelligent enough to know what he was doing?

A Yes.

Q Did he appear to you to be under the influence of dope or drugs or alcohol when he was carrying out these acts?

A No.

Q Do you think, in your opinion, did he intend the consequences of these acts in relationship to Stephen ORlando?

A Yes.

(Tr. 27, 28, 29).

The trial judge reminded counsel for petitioner that codefendant Evans and Crittendon were convicted by the jury of murder in the second degree in the Orlando murder and that subsequently they entered a plea of guilty to second degree murder in the Roberts case. Both were sentenced to 199 years in

each case making a total sentence of 398 years for each of them (Tr. 34, line 18--p. 35, line 7).

Petitioner did mention the PSI by referring to a burglary conviction of June 16, 1971 noted therein. This was in connection with the trial judge having found that Petitioner had been previously convicted of a felony involving the use of threat or violence to the person. The point petitioner was making was that the PSI didn't show whether violence or the threat of violence was involved in this particular conviction for breaking and entering with intent to commit grand larceny. Petitioner indicated that he would supplement the record if the necessary reports could be found (Tr. 45, line 10-- p. 47, line 12). Petitioner chose not to testify at the hearing (Tr. 48) and stated that he was satisfied with the services of his counsel (Tr. 50). Petitioner's counsel requested that he be allowed to present his argument in behalf of appellant subsequent to the hearing in which codefendant Dougan would present responses to the PSI. The trial judge was agreeable to this request (Tr. 52).

Oral arguments were heard on October 23, 1979. The first part of petitioner's argument was directed to what he considered "basic defects in the original sentencing order" (Tr. 56, lines 16, 17). Since much of petitioner's argument was directed to the original judgment and sentence, extensive references were made to the original transcript (Tr. 58). The trial judge's findings of fact were challenged as being "totally erroneous" (Tr. 59). Petitioner admitted that he had two prior convictions (Tr. 61). Extensive remarks were adressed to the issue of whether the victim begged for mercy (Tr. 65, 66). Comment was made on the fact that Petitioner did not participate in the Roberts' murder and that in the Orlando murder codefendant Evans was the first to start stabbing the victim and then appellant took over and continued the stabbing (Tr. 67, 68). The remainder of

petitioner's argument was directed towards challenging the trial judge's findings of fact and the determination of applicable mitigating and aggravating factors at his trial in February 1975 (Tr. 70-95).

In his response to petitioner's argument, the state attorney rebutted the argument challenging the validity of the aggravating and mitigating factors as previously determined by the trial judge (Tr. 96, line 20-- p. 108, line 8). However, the state attorney's basic position was stated as follows:

> I have carefully considered all of those matters presented by the defendant in response to the presentence investigation report, and I find nothing in such responses which mitigates any circumstance herein

(Tr. 126)

Appellant Barclay was sentenced to death (Tr. 128, line 14-- p. 129, line).

QUESTIONS PRESENTED

The issues set forth on p. 3 of the petition have previously been rejected by this Court. Barclay v. Florida, 439 U.S. 892 (1978). In Barclay v. State, 362 So.2d 657 (Fla. 1978), the Florida Supreme Court relinquished jurisdiction for the purpose of affording petitioner an opportunity to respond to the presentence investigation report that had been used at his initial sentencing. The court's order limited the scope and purpose of the hearing as follows:

> To assure that the sentencing procedure in this case satisfies the constitutional command of the Due Process Clause, the death sentences are vacated and the cause is remanded to the trial court. The court is directed to provide a hearing at which the defense has the opportunity to rebut any of the information contained in the presentence investigation reports, whether in the confidential portion of the report or any other part. This direction, of

> course, requires that the defense have access to the reports-in-full with sufficient time before the hearing to prepare rebuttal. Following the hearing the court is to impose sentences. If death is imposed as to either appellant there will be available in this Court review, limited to matters related to compliance with this order.

362 So.2d, at 658. This was done. On June 22, 1979, October 23, 1979, and April 18, 1980, plenary hearings were held in response to the above-quoted order of the Florida Supreme Court. Petitioner was given the opportunity of calling any number of witnesses for the purpose of rebutting anything in the presentence investigation report that he deemed harmful or incorrect. At the conclusion of the hearing, the trial judge reimposed the death penalty. (Petitioner's Appendix, pp. 14-43.) Consequently, petitioner does not present this Court with any issue arising out of the Gardner proceedings either at the trial level or on review by the Florida Supreme Court. Rather, petitioner presents this Court with two issues that have previously been rejected by the Florida Supreme Court and this Court. Barclay v. Florida, 439 U.S. 892 (1978). Because this is a death case, respondent restates the issues as framed by petitioner as one issue:

WHETHER PETITIONER'S DEATH PENALTY WAS LAWFULLY IMPOSED.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

As the trial judge found, the aggravating circumstances identified outweighed any possible mitigating circumstances. In fact, there were no mitigating circumstances.

In determining that petitioner knowingly created a great risk of death to many persons, § 921.141(5)(c), F.S., the trial judge found as follows:

FACT:

The testimony and evidence showed that Barclay and the other defendants drove around various areas of the City looking for a victim or victims - thus potentially exposing numbers of people to a great risk of death. On at least two occasions the defendants parked their car - and cased areas where they had chosen potential victims - but were thwarted by the circumstances that fortuitously existed. Five persons were exposed to their planned murder and it was not out of concern for the lives of many persons that only a single victim was chosen - but rather out of concern for their own detection and capture. The tapes made by Barclay and Dougan - which were sent to the media - were a declaration of war by the murderers against white people. It was a call for others to join in their homicidal schemes and it was a call for revolution and racial war between a black and white population - if confined to Jacksonville - of over one-half million persons. Barclay and the other defendants did, in fact, knowingly create a great risk of death to many persons. The extent of that danger - had they been successful to any degree - boggles the mind by contemplanting the monstrous consequences.

CONCLUSION:

There is an aggravating circumstance here because not only did Barclay and the other defendants murder Stephen Anthony Orlando - they also created a great risk of death to others, before, during and after the murder.

(R 77, 78)

The trial judge found that the murder for which petitioner was convicted was committed while he was engaged in the crime of kidnapping, § 921.141(5)(d), F.S., as proscribed by § 787.01, F.S. (1979). Petitioner may be heard to complain that the trial judge erred because § 787.01, F.S., was not on the books at the time the Orlando murder was committed on June 16, 1974. Not so. It is true that § 805.02, F.S. (1973), proscribed the crime of kidnapping for ransom. But this isn't the end of the matter! Petitioner conveniently overlooks § 805.01, F.S. (1973), which provides as follows:

805.01 False imprisonment and kidnapping. -- Whoever without lawful authority forcibly or secretly confines or imprisons another person within this state against his will, or confines or inveigles or kidnaps another person, with intent either to cause him to be secretly confined or imprisoned in this state against his will, or to cause him to be sent out of this state against his will; and whoever sells, or in any manner transfers, for any term, the service or labor of any other person who has been unlawfully seized, taken, inveigled or kidnapped from this state to any other state, place or county shall be guilty of a felony of the second degree, punishable as provided in § 775.082, § 775.083, or § 775.084.

Thus, petitioner's active participation in the murder of Stephen Orlando abundantly supplies the elements of the crime of kidnapping as set forth in the 1973 statute, as well as the present statute quoted in part by the trial judge (Petitioner's appendix, p.37). This aggravating circumstance was approved by the Florida Supreme Court on initial review. Barclay, 343 So.2d, at 1271. It is noted that Barclay was decided March 17, 1977, approximately eighteen (18) months after the effective date of the present kidnapping statute, i.e., October 1, 1975. The Florida Supreme Court properly applied the law as it existed when the appeal was decided.

The trial judge found that the murder for which petitioner was convicted was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws. § 921.141(5)(g), F.S. On initial review, the Florida Supreme Court approved this aggravating circumstance. Barclay, 343 So.2d, at 1271.

The trial judge found that the murder for which petitioner had been convicted was especially heinous, atrocious and cruel. § 921.141(5)(h), F.S. See petitioner's appendix, pp. 42, 43. On petitioner's initial review, the Florida Supreme Court put its

stamp of approval on this aggravating circumstance, as well as several others. Respondent quotes from the Barclay opinion:

> Four others were present to some degree, namely that Dougan's crime had created a great risk of death to many persons, had been committed while engaged in a kidnapping, had endeavored to disrupt governmental functions and law enforcement, and had been especially heinous, atrocious and cruel. These findings are also well documented in the record before us. . . .
>
> As regards Barclay, who had received a life recommendation from the jury, virtually the same considerations apply with respect to consequences of the criminal episode.

Id. at 1271. The remarks of the state attorney at the Gardner hearing in the trial court adequately expresses respondent's opinion on this issue. For the convenience of this Court, we quote the following:

> The cruel, heinous and atrocious aspect of it, this boy was not hurting anybody, he was sitting on a curb in Jacksonville Beach, Florida. They got him into the car on the pretense of taking him somewhere. They took him -- once he realized they were not going where he wanted to, they just kept him in the car, took him down off of a paved road, down near Ponte Vedra, drove up a dirt road near a garbage dump at night, a total stranger. This is a young high school boy. Heis surrounded by five men, all older, large, most of them, strangers, total strangers to him of a different race for whatever significance that is.
>
> They got him out of the car by this dump on a dirt road and when he started to try to run they knocked him down, they hit him and knocked him to the ground. He had time at that point to know the terror and the fear of what was going to happen to him, that he was going to die. He knew he was going to die. He said, "[h]ere, please take my marijuana cigarette and let me go." He knew he was going to die. But with these people standing around him, this man took a knife and tried to penetrate Stephen Orlando's body with that knife. It was a pocketknife, it really didn't do the job. It must have hurt a great deal. They were trying to put it into Stephen Orlando's body but it just wouldn't quite go and do the job to kill him that he

intended it to. And this man stabbed him a number of times with a pocktknife, I think five or six times, I don't remember the medical testimony, I don't think it's material. But he tried to repeatedly, to stab Stephen Orlando. Stephen Orlando didn't die at first, so he had time to suffer, to agonize, to know as a young as a young person would know best of all that his young life was about to be snuffed out for no reason by total absolute strangers.

And then Dougan went over, and my recollection is, I think it's in the deposition or in the trial, that he put his foot on Stephen Orlando's neck and put a pistol -- .22 pistol to his head and shot him in the head and he died at that point pretty quickly.

* * * * *

This is, you know, an 18-year-old boy. It just -- hadn't even started to live. I don't know what the Court has in mind totally on specially atrocious, heinous and cruel, but if this isn't it, I don't know where they are going to find it. I don't know if we have to envision some torture or not, I don't think so. But they do envision this as being an atrocious, heinous, and cruel because they said so in this report.

(Tr. 102-104)

Petitioner seems to urge that his death sentence is based in part on a nonstatutory aggravating circumstance. The trial judge did find that although not imprisoned, petitioner's criminal record was an aggravating circumstance. However, in Mikenas v. State, 367 So.2d 606 (Fla. 1979), the Florida Supreme Court had this to say:

> In capital cases, it is this court's responsibility to insure that the trial judge remains faithful to the dictates of Section 921.141, Florida Statutes, in the sentencing process. It is not the function of this court to cull through what has been listed as aggravating and mitigating circumstances in the trial court's order, determine which are proper for consideration and which are not, and then impose the proper sentence. In accordance with the statute, the culling process must be done by the trial court. It was not done in this case. A substantial history of prior criminal activity is not an aggravating circumstance under the

> statute. Since mitigating circumstances are present, Elledge, supra, dictates resentencing.

Id. at 610. But as to petitioner, there were no mitigating circumstances! Consequently, the rationale of Ellege v. State, 346 So.2d 998 (Fla. 1977), does not require a resentencing. Any argument to the contrary must be viewed as nothing less than an outright repudiation of this Court's holding in Proffitt v. Florida, 428 U.S. 242 (1976). The Proffitt opinion sets forth the aggravating circumstances found by the trial judge as follows:

> (1) The murder was premeditated and occurred in the course of a felony (burglary); (2) the petitioner has the propensity to commit murder; (3) the murder was especially heinous, atrocious and cruel; and (4) the petitioner knowingly, through his intentional act, created a great risk of serious bodily harm and death to many persons.

428 U.S., at 246. This is interesting because the aggravating circumstance of "propensity to commit murder" is not now and never has been a statutory aggravating circumstance under the Florida death penalty statute. See Proffitt, 428 U.S. 248, n. 6, which sets forth the statutory aggravating circumstances in effect at the time Proffitt was decided. The unmistakable conclusion is that this Court approved the use of a nonstatutory aggravating circumstance when used along with other statutory aggravating circumstances for the purpose of supporting the imposition of the death penalty. It is noted that petitioner's trial date was February 21-March 4, 1975; however, the case of Purdy v. State, 343 So.2d 4 (Fla. 1977), restricting the use of aggravating circumstances to those enumerated in the statute was not decided until March of 1977, approximately two years following the date of petitioner's trial.

It should be emphasized that what mandated the result reached in Elledge v. State, supra, was from the record before it

that the Florida Supreme Court could not determine whether the trial judge had permitted a statutory mitigating circumstance to be offset by a nonstatutory aggravating circumstance. But in the instant case, the trial judge found that there were no mitigating circumstances. Therefore, there could be no danger of a non-statutory aggravating circumstance offsetting a statutory mitigating circumstance in the weighing process. The Elledge court did not condemn the use of nonstatutory aggravating circumstances as long as they were not used by the trial judge in offsetting statutory mitigating circumstances. See also Douglas v. State, 373 So.2d 895 (Fla. 1979); Hargrave v. State, 366 So.2d 1 (Fla. 1979); Brown v. State, 381 So.2d 690 (Fla. 1980). Frankly, it is difficult to understand how the consideration of one nonstatutory aggravating circumstance, along with several statutory aggravating circumstances, can be assigned as constitutional error when it was proper at that time for the trial judge so to do.

Following the Gardner hearing in the trial court, the trial judge found that petitioner had been previously convicted of another capital felony or of a felony involving the use or threat of violence to the person. As to this issue, the trial judge specifically found as follows:

> FACT:
>
> The defendant, Barclay, was previously convicted of breaking and entering with intent to commit the felony of grand larceny. It is not known if such prior felony involved the use or threat of violence in the crime. However, such crime can and often does involve violence or threat of violence - if there is a person in the building broken into.
>
> CONCLUSION:
>
> This is more of an aggravating than a negative circumstance.

(Petitioner's appendix, pp. 35, 36.) Petitioner seems to be

urging that the trial judge engaged in speculation in determining that his prior felony conviction for breaking and entering with intent to commit grand larceny involved the use or threat of violence to the person. By the same token, respondent urges that petitioner is now asking this Court to speculate in second-guessing the trial judge by holding that petitioner's breaking and entering conviction did not involve the use or threat of violence to the person. Petitioner had every opportunity to submit evidence on this issue at the hearing below. In fact, this was the purpose of the hearing, i.e., to permit him to respond by denying, correcting or mitigating anything unfavorable in the presentence investigation report. If, in fact, petitioner's prior breaking and entering conviction did not involve the use or threat of violence to the person, this could have been proven at the hearing below. Petitioner's appointed counsel was far from being a novice in the field of criminal law. His failure to submit evidence on this issue points to the unmistakable conclusion that the trial judge was correct in his determination. At the risk of being repetitious, the hearing below was granted for the purpose of permitting petitioner to respond to the presentence investigation report, not for the purpose of requiring the prosecution to once again prove the aggravating circumstances beyond a reasonable doubt. This had already been done at petitioner's trial, and the Florida Supreme Court on appellate review put its stamp of approval on the trial judge's determination of identifiable and proven aggravating circumstances.

Petitioner seems to take comfort in the recent decision of this Court in Zant v. Stephens, ____U.S.____ (1982), Vol. 31 CrL Reptr. 3035. Such reliance is misplaced. In Stephens, a Georgia jury sentenced a habeas petitioner to death based on a number of aggravating circumstances, including one circumstance

later held unconstitutional. 631 F.2d, at 405, 406. Because it was impossible for the reviewing court to determine the extent of the impact of the unconstitutional circumstance on the jury's verdict, i.e., whether the jury would have voted to impose the death sentence absent the invalid circumstance, the Fifth Circuit struck down the sentence. 631 F.2d, at 406.

The focus of the Stephens case was on the impossibility of rational review of the Georgia jury's actions, and that decision did not forge a rigid rule rendering unconstitutional the imposition of the death penalty in all cases in which invalid aggravating circumstances are considered by the sentencing authority. The Georgia statute involved in Stephens differs from the Florida sentencing statute. For example, under the Georgia statute, the jury was not required to state what mitigating circumstances, if any, were considered; by contrast, under Florida law, the trial judge was at the time of petitioner's sentencing (and is today) required to prepare written findings reciting both aggravating and mitigating circumstances. The Florida Supreme Court has repeatedly held that reversal of death sentences is not required merely because invalid aggravating circumstances are considered, even when coupled with a mitigating circumstance, so long as it can be known that the result of the weighing process would not have been different had the impermissible factors not been present. Armstrong v. State, 399 So.2d 953 (Fla. 1981). It is submitted that Stephens does not impinge upon this rule. It should be noted that in the instant case, unlike Stephens, none of the alleged nonstatutory aggravating circumstances have been declared unconstitutional. Of course, neither have any of the statutory aggravating circumstances been declared unconstitutional.

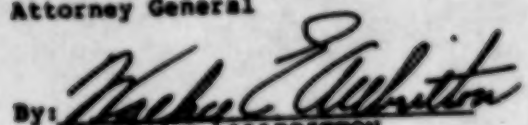
The recent decision of this Court in Enmund v. Florida, _____U.S.____(1982), Case No. 81-5321, decided July 2,

1982, can have no application to the facts of the instant case. Please see petitioner's appendix, the instant case. pp. 22-26; pp. 30, 31.

CONCLUSION

The petition for writ of certiorari should be denied.

JIM SMITH
Attorney General

By: 
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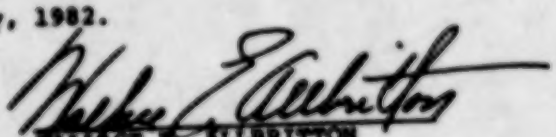
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished a copy of the foregoing Brief in Opposition to Mr. Elwood Barclay, in proper person, 437 East Monroe Street, Jacksonville, Florida 32202, by U.S. Mail, this 15th day of July, 1982.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